IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 949 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJUBHAI JESINGBHAI CHAUHAN & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR AM PAREKH for Appellant(s) : 1 - 2.
MR ND GOHIL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 07/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellants have preferred this appeal

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment dated 18-09-1997 passed by the learned Addl. City Sessions Judge, Court No.3, Ahmedabad in Sessions Case No. 187 of 1996, convicting them for the offence punishable under Section 302 read with section 114 of the I.P. Code and sentenced to undergo life imprisonment and each to pay fine of Rs.500/-, in default thereof, to undergo imprisonment of one month.

2. The facts, in nut shell, emerging from the prosecution case are that Rajeswariben @ Rajeshri was married to appellant (original accused No. 1) Rajubhai Jesingbhai Chunara before about 12 to 13 years of the incident and were residing at Hatkeswar (Amraiwadi area) in Ahmedabad. Some time after the marriage deceased Rajeshwari alias Rajeshri started residing separately from her in-laws in the hut at Ramgali in Maninagar area of Ahmedabad with her husband. Appellant Rajubhai Jesingbhai was serving in a grinding mill. Deceased Rajeshri had three children. Rajeshwari told her father that her maternal uncle-in-law appellant(original accused No.4)

Dashrath is spoiling her husband appellant Rajubhai by making him to consume liquor and when she objected her husband beat her at the instigation of appellant Dashrath. There were quarrels between Rajeshwari and her husband appellant Rajubhai but the father of Rajeswhari asked her to keep patience. On 27th October, 1996 Rajeshwari was taking rest after finishing her house-hold work in the afternoon. At about 3-30 p.m. all the appellants came inside the house and locked it from inside. Appellant Lakhuben alias Lakshmiben Jesingbhai Chunara (mother-in-law) caught hold of Rajeshwari @ Rajeshri, appellant Jesingbhai (father-in-law) caught hold of hands of Rajeshwari, appellant Rajubhai asked to beat Rajeshwari and so appellant Dashrath gave kick blows and poured kerosene over her and appellant Rajubhai ignited match-stick and set her on fire. On account of fire Rajeshwari sustained burn injuries and was taken to L.G. Hospital, Ahmedabad for treatment, where the Executive Magistrate was called and he recorded her dying declaration. The father of Rajeshwari, Jayantibhai Kalidas was informed about the incident who came at Burns Ward in L.G.

Hospital, Ahmadabad but was not permitted to see Rajeshwari immediately. However, he met her after about 1 ½ hours. On asking Rajeshwari @ Rajeshri informed her father about the incident. Therefore, Jayantibhai lodged a compliant before police and statement of Rajeshwari was recorded. Rajeshwari succumbed to burn injuries during treatment.

3. On the basis of the First Information Report given by Jayantibhai Kalidas offense was registered as I – CR No. 414 of 1996 at Maninagar Police Station Ahmadabad and investigation was started. During the course of the investigation, dead body of Rajeshwariben was sent for postmortem examination. Panchanama of scene of offence, inquest panchanama and panchnama of recovery of muddamal were drawn. Statements of the witnesses were recorded and the accused were arrested.

4. On completion of the investigation, charge sheet was laid before the Metropolitan Magistrate, Ahmedabad. for the offence punishable u/s 302 and 114 of the I.P. Code. As the offence was exclusively triable by the

Court of Sessions, the case was committed to the City Sessions Court, Ahmedabad and it was registered as Sessions Case No. 187 of 1996. Charge Exh. 2 was framed against the accused for the offences punishable u/s 302 and 114 of the I.P. Code and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against the accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against them in the evidence. The accused denied having committed the office in their further statement recorded u/s 313 of the Code of Criminal Procedure, 1973 and stated that false case has been filed against them.

5. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found all the accused guilty for the offence punishable under Section 302 read with Section 114 of the I.P. Code and sentenced them to undergo the sentence as mentioned

hereinabove. Therefore, the accused have preferred this appeal challenging the impugned judgment and order of conviction.

6. During he course of hearing, it was brought to our notice that appellant No. 2 – Jesingbhai Chhanabhai Chunara and appellant No. 3 Lakhuben @ Lakshmiben Jesingbhai Chunara have expired. It was also brought to our notice that no near relative of the deceased appellants made any prayer to this court for leave to continue the appeal. In view of this fact, this Court by order dated 3-11-2006 abated the appeal against deceased appellant No.2 Jesingbhai Chhanabhai and appellant No.3 Lakhuben @ Lakshmiben.

7. We have heard learned advocate Mr. A.M. Parekh for the appellants and learned A.P.P. Mr. N.D. Gohil, for the respondent – State at length and in great detail. We have also perused the judgment of the trial court as well as the record and proceedings of the case.

8. Learned advocate Mr. Parekh for the appellant submitted that the alleged dying

declaration given by deceased Rajeshwari @ Rajeshri does not inspire any confidence and could not have been relied upon by the learned trial Judge to base the conviction as there are several infirmities. He also submitted that the deceased was not in fit state of mind at the time of giving dying declaration and therefore the learned trial Judge has committed an error in relying upon the dying declaration. He also submitted that the prosecution did not examine the material witnesses like Dr. Tushar Patel and Dr. Rupesh Mehta who initially gave treatment. The other witness i.e. Police Constable who recorded the statement of the deceased in the hospital is also not examined by the prosecution. These witnesses could have thrown light on the state of mind of the deceased and the cause of the injuries. Non-examination of these witnesses has resulted into prejudice to the accused. He also submitted that the deceased gave different versions about her injuries. There is no evidence to indicate that the appellants were responsible for the injuries caused to the deceased, and therefore, the impugned judgment requires to be set aside and the appeal requires to be allowed.

9. Learned A.P.P. Mr. Gohil strongly opposed the appeal and submitted that there is no inconsistency in the dying declaration of the deceased. The Executive Magistrate, before recoding dying declaration had ascertained about the health of the deceased. The doctor also gave his opinion with regard to the condition of the declarant, and therefore, there is no infirmity in the dying declaration. He also submitted that the deceased gave oral dying declaration before her father Jayantibhai Kalidas. Thus, there is consistency, and therefore, it cannot be said that the deceased gave inconsistent version. He also submitted that there is no defect in the investigation and even if there is any defect in the investigation, it is not fatal to the prosecution case. He also submitted that non-examination of the witnesses cannot be fatal to the prosecution case. Therefore, the learned trial Judge was justified in convicting the appellants. In support of his arguments, he has relied on the decisions of the Apex Court (i) in Ramanand Yadav V/s. Prabhu Nath Jha and others reported in AIR 2004 SC 1053 and (ii) in State of U.P.

V/s. Hari Mohan and others, reported in AIR 2001 SC 142.

10. The prosecution case mainly rests upon the dying declaration allegedly given by deceased Rajeshwari @ Rajeshri. It appears from the prosecution case that Rajeshwari @ Rajeshri gave one oral dying declaration before her father Jayantibhai, another dying declaration before the Police Officer who recorded her statement, the third before the Doctors who started her treatment and fourth before the Executive Magistrate. In order to prove the written dying declaration, the prosecution examined Executive Magistrate P.W. 4 Anilkumar Maganlal Makwana at Exh. 24. It appears from the testimony of this witness that when he was in the hospital, recording dying declaration in other case, he was given “yadi' Exh. 25 to record dying declaration of Rajeshwari @ Rajeshri. The evidence also indicates that the witness went to the Burns Ward and the nurse identified patient Rajeshwari. The witness after ascertaining that the patient was conscious, started recording the dying declaration and it was recorded in question – answer form. The

evidence of this witness indicates that in the examination in chief he stated that right thumb impression was obtained in the dying declaration Exh. 26 but in the cross-examination he admitted that he made a note in the dying declaration Exh. 26 that impression of right toe is obtained. In view of this discrepancy the court asked the witness as to which version is correct. The witness clarified this discrepancy by stating that right toe impression was taken on the dying declaration Exh. 26. In view of this discrepancy, the evidence of this witness raises a suspicion about the execution of the dying declaration.

10. The prosecution produced 'Yadi" given to the Executive Magistrate at Exh. 25 and the dying declaration at Exh.26,

11. The "Yadi" Exh. 25 indicates that it was written by Head-Constable of Maninagar Police Station, Ahmedabad to the Executive Magistrate requesting him to record dying declaration of Rajeshwari and appellant Rajubhai, who were admitted in the hospital with burn injuries. It records that

Rajeshwariben poured kerosene on her body and sustained burn injuries and appellant Rajubhai sustained burn injuries on his both legs and ankle while extinguishing the fire. It bears an endorsement of the doctor that the patient was conscious at 5-40 p.m.

12. The Yadi from the record and proceedings of the case indicates that correction is made in the endorsement of timing. The Executive Magistrate had also made an endorsement in the 'yadi' that it was given to him in the hospital at 5-40 p.m.

13. In order to prove the endorsement of the doctor on 'yadi' Exh. 25, the prosecution examined P.W. 7 Swanand Narayan Swami at Exh. 32. It appears from the evidence of this witness that injured Rajeshwari was not in a position to give history of her injuries and her relatives informed that she sustained burns by kerosene flame. The evidence also indicates that the injured was being given intravenous fluid for 24 hours and was being administered antibiotics and pain-killers at 5-30 p.m. She was not in a position to speak till painkillers and Fortwyn injections were

administered and after application of injection her condition improved. In the cross-examination the witness admitted that a patient would be depressed and would not be coherent on administration of Fortwyn injection. This evidence is contrary to the endorsement made on 'yadi' Exh. 25 that the patient was conscious at 5-40 p.m. In the reply to the question put by the court the witness stated that the endorsement made about the state of mind at 5-40 p.m. is the correct version. On overall view of the evidence a doubt is created as to whether the deceased was conscious and in a fit state of mind to give her dying declaration.

14. The prosecution produced the medical certificate and treatment papers of the deceased at Exh. 34 and Exh. 35 respectively. The medical certificate Exh.34 indicates that Rajeshwari was brought to the hospital at 4-10 p.m. on 27-10-1995 with the history of kerosene burn. The certificate also indicates that the patient was not giving proper history of her injuries and had 2nd and 3rd decree burns of 64% on the body. It also indicates that Dr. Tushar Patel

and Dr. Sarvanand examined her. The O.P.D. Case paper a part of medical case papers Exh.35 indicates that Rajeshwari was brought to the hospital at 4-10 p.m. with the history of burn injury due to bursting of stove and was advised to be admitted in Burns Ward. The surgical history sheet which is a part of Exh. 35 indicates that Rajeshwari was admitted in the hospital at 4-25 p.m. with the history of kerosene burn but was not giving proper history of her injury and the informant was her relative. It also indicates that she had difficulty in opening her eyes. This evidence clearly indicates that Rajeshwari was not in fit state of mind to give history of her injury. Therefore, in our view, it would not be safe to rely upon the history of injuries recorded in the case papers as a dying declaration of Rajeshwari.

15. The prosecution produced dying declaration at Exh. 26 and examined Executive Magistrate P.W. 4 Anilkumar Maganlal Makwana at Exh. 24 who recorded the dying declaration. It narrates the incident in detail and indicates that the deceased stated that she was being harassed by her

husband, father-in-law and mother-in-law. The deceased had put her right toe impression on the dying declaration. It was recorded between 5-45 p.m. and 6-15 p.m. on 27-10-1995. The 'vardhi' Exh. 19 given by the constable at the hospital under the instructions of Resident Medical Officer (R.M.O.) of the hospital indicates that Rajeshwari had poured kerosene on herself and sustained burn injury and appellant Rajubhai had sustained burn injury as he tried to extinguish the fire. This 'vardhi' is recorded in the police station at 16-40 hours. The prosecution examined P.W. 7 Dr. Swanandan who examined Rajeshwari immediately after her admission in the hospital who deposed that the history of injury was given by her relative and Rajeshwari was not in a position to give the history. P.W. 2 Bachubhai Exh. 17 the relative who took Rajeshwari and appellant Rajubhai to the hospital as per 'vardhi' Exh.19 has not supported the prosecution case. As observed earlier, there is correction in the timing in 'yadi' Exh. 25 and the witness is unable to explain the same. In view of this, it will be difficult to believe that Rajeshwari was in fit state of

mind to give dying declaration Exh. 26. On conjoint reading of medical papers Exh. 35, evidence of P.W. 7 Dr. Swanandan and 'yadi' Exh. 25, we are unable to accept that deceased Rajeshwari was in the fit state of mind to give true account of her burn injuries. There are numerous infirmities in the evidence with regard to state of mind of deceased Rajeshwari. Therefore, it will not be safe to rely upon alleged dying declaration Exh. 26 to connect the appellants with the offence.

16. According to the prosecution deceased also made oral dying declaration before her father P.W. 1 Jayantibhai Kalidas at Exh. 16. The evidence of this witness indicates that when he was at home some boy informed him about the incident but he does not know who the boy was. It also appears that thereafter the witness went to the hospital but was not permitted to meet the deceased in the burns ward and was kept sitting outside for about three to four hours and thereafter allowed to meet Rajshwari in the evening. The evidence also indicates that the witness reached at the hospital within 15 to 20 minutes after receiving the news but did not

see the Executive Magistrate. Now, considering the medical evidence it would be difficult to accept that the deceased was in a fit state of mind to give oral dying declaration after about three to four hours of the incident as she was not in a position to give history of injury to the doctor. Therefore, the evidence of this witness with regard to oral dying declaration and F.I.R. Exh. 47 do not inspire confidence.

17. As regards the dying declaration before the Police Officer P.W. 8 Prafulbhai Maganbhai Patel Exh. 42 has not deposed about any dying declaration in the form of statement of Rajeshwari. Therefore, in our view, there is no such dying declaration.

18. The prosecution examined P.W. 2 Bachubhai Ramanlal who brought Rajeshwari to the hospital at Exh.17. The witness has not supported the prosecution. Therefore, the witness who, in fact, could have thrown light on the incident, has not supported the prosecution case. Therefore, there is no evidence to indicate that the appellants were involved in the offence.

19. The prosecution examined Investigating Officer P.W. 8 Prafulbhai Maganbhai Patel at Exh. 42. It appears from his deposition that on receiving 'vardhi' Exh. 19, he went to the surgical ward of L.G. Hospital where Rajeshwari was transferred. The evidence indicates that the condition of Rajeshwari was critical, and therefore, he met her father Jayantibhai Kalidas and recorded F.I.R. Exh. 47. The evidence also indicates that the witness went to L.G. Hospital, Maninagar, Ahmedabad at about 4-45 p.m. and was not aware about 'vardhi' Exh. 19given by P.W. 6 Lakhuji Gulabji with regard to the incident. The evidence of the witness also indicates that when he went to the hospital, Rajeshwari was in critical condition, and therefore, her statement was not recorded. In view of this evidence also it is difficult to believe that deceased Rajeshwari could have given her dying declarations as alleged by the prosecution. This also creates doubt about trustworthiness of the dying declaration Exh. 26 given by deceased Rajeshwari.

20. The prosecution produced the report with

regard to incident at Exh.43. It appears from report that the offence was registered at about 20-15 hours on 27-10-1995. The incident occurred at 15-00 hours but the offence is registered after about five hours though 'vardhi' Exh. 19 was given to the police station at 16-40 hours giving all the necessary details of the incident. This delay is not explained by the prosecution and therefore there are serious discrepancies about the manner in which the offence was allegedly committed. Therefore, in our view, it would not be safe to rely upon the alleged dying declaration to connect the appellants with the offence.

21. The prosecution has not adduced any evidence to prove that appellant Dashrathbhai used to make appellant Rajubhai to drink liquor and on that account there were quarrels between the deceased and her husband appellant Rajubhai. Except accusations in the dying declaration Exh. 26 there is no evidence with regard to complicity of appellant Dashrathbhai in the offence. In view of this evidence, it would be difficult to believe that on account of quarrels the deceased was

set on fire by the appellants.

22. The prosecution produced postmortem report at Exh.29. It indicates that the cause of death was due to shock of burn injuries and its complication. The postmortem report does not indicate that there were physical injuries on the dead body of Rajeshwari.

23. The prosecution examined P.W. 5 Dr. Dharmeshbhai Somabhai at Exh. 28 who performed postmortem of deceased Rajeshwari. The witness deposed that he cannot say as to whether the injuries were accidental, suicidal or homicidal. However, the witness deposed that the injuries were sufficient in the ordinary course of nature to cause death of the deceased. In view of this, it cannot be said that the prosecution proved beyond reasonable doubt that the injuries were homicidal in nature. Moreover, there is no evidence to connect the appellants with the burn injuries caused to deceased Rajeshwari. Therefore, in our view, the prosecution miserably failed to prove beyond reasonable doubt that the burn injuries sustained by deceased Rajeshwari were homicidal in nature

and appellants were responsible for the injuries.

24. In view of above, in our view, the learned trial Judge was not justified in convicting the appellants solely relying on the dying declarations which suffer from numerous infirmities.

25. In the decision of the Supreme Court in **State of U.P. V/s. Hari Mohan and others, reported in AIR 2001 SC 142**, the Apex Court has held that **"defective investigation cannot be made a basis for convicting the accused"**. In the present case, we do not find that there was defective investigation. However, the prosecution did not produce any cogent and reliable evidence to connect the appellants with the offence. The evidence which is produced is not sufficient to connect the appellants with the offence, and therefore, in our view, the decision is not applicable to the facts of the present case.

26. The prosecution also relied on the decision of the Supreme Court in Ramanand

Yadav V/s. Prabhu Nath Jha and others reported in AIR 2004 SC 1053 with regard to non-examination of the independent witnesses. It is not in dispute that there are no eye witnesses and the only witness who brought injured Rajeshwariben to the hospital has not supported the prosecution. Therefore, in the facts of the present case, this decision of the Supreme Court is also not applicable.

27. In view of above, we are of the view, that the learned trial Judge committed error in convicting the appellants solely relying upon the dying declaration Exh. 26 which suffers from serious infirmities. Therefore, the judgment of the trial court is required to be set aside and the appeal deserves to be allowed.

28. In view of above discussion, this appeal is allowed and the judgment and order of conviction dated 18-09-1997 passed by the learned Addl. City Sessions Judge, Court No.3, Ahmedabad City in Sessions Case No. 187 of 1996 is set aside and appellant No.1 Rajubhai Jesingbhai Chunara and appellant No. 4 Dashrathbhai Chandulal Chunara are acquitted for the offence charged against them and they are ordered to be set free

forthwith, if they are not required in any other offence. The fine, if paid, be returned to the appellants concerned. The muddamal be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/